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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No: 71-733

Harvey H. Allen and Simona A. Allen,

Petitioners

vs

State Board of Education of North Carolina; Charles F. Carroll, etc.; Winston-Salem/Forsyth County Board of Education; Board of County Commissioners of Forsyth County; and City of Winston-Salem, North Carolina,

Respondents.

****

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

****

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State Board of Education of North Carolina et al.,

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TO UNITED STATES COURT OF APPEALS
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Petitioners, Harvey H. Allen and Simona A. Allen, pray for a writ of certiorari to review the Judgment-Opinion of the United States Court of Appeals for the Fourth Circuit, dated and entered September 9, 1971, a copy of which is attached hereto as "Exhibit A", which affirmed an "Order For Final Judgment" and a "Final Judgment (Partial)" entered by the United States District Court for the Middle District of North Carolina, Winston-Salem Division, copies of which

Order and Final Judgment are hereto attached as "Exhibit B" and "Exhibit C" respectively. The Judgment-Opinion of the Court of Appeals has not yet been reported.

JURISDICTION

This Court's jurisdiction is conferred by Title 28, §1254(1) of the United States Code, and 28 USC §2101(c) fixes the time for applying for the writ at "ninety days".

QUESTIONS PRESENTED FOR REVIEW

In the context of Rule 23(c) of the Rules of this Court, the following questions are presented for review:

1. Petitioners' complaint in the District Court having prayed for declaratory and injunctive relief that the $24.8 million school bond issue here involved be enjoined "except pursuant to a plan approved in advance by" the Court, and the motion of Respondent Winston-Salem/Forsyth County Board of Education for said "Final Judgment (Partial)" having been entirely "based on facts not appearing of record" (Rule 43(e) of the Federal Rules of Civil

Procedure), and no evidence of any kind having been offered at the hearing of said motion, was the affirmance of said final judgment by the Court of Appeals in conflict with applicable decisions of this Court which hold that it is a denial of due process of law for a final judgment to be entered without any evidence to support it, and did such affirmance and said final judgment violate the requirements of Rule 43(e) of the Federal Rules of Civil Procedure?

2. This Court having held in Swann v Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, 558 (1971), that

> "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to.... the quality of school buildings and equipment .... a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown."

And it being admitted in this case that it is possible to identify schools in Negro neighborhoods simply by reference to the quality of school buildings and equipment, was the decision of the

Court of Appeals in conflict with Swann when it did not find such a violation of substantive Constitutional rights in this case?

3. Where, at the time the Court of Appeals decided this case on September 9, 1971, there was pending in this Court the case of Winston-Salem/Forsyth County Board of Education v Scott, No. 71-274, October Term, 1971, in which the Chief Justice in his opinion denying a stay referred to a District Court finding that "the racial concentration of Negroes was not caused by public or private discrimination or state action but by economic factors and the desire of Negroes to live in their own neighborhoods rather than in predominantly white neighborhoods," and where the Court of Appeals suggested to the District Court the consolidation of this case with the Scott case "if the interest of the plaintiffs in the Scott case would not be adversely affected by it," but without any similar protection for the interest of these Petitioners, and where, when Shelley v Kraemer, 334 U.S. 1, was decided by this Court on May 3, 1948,

massive racial restrictive covenants, some running for as long as 99 years and all valid under North Carolina law, fairly encircled "the racial concentration of Negroes" in Winston-Salem, N. C., and where none of the parties in the trial of the Scott case called these racial restrictive covenants to the attention of the District Court,--against the possibility that this unequal protection of the interest of the plaintiffs in the two cases may hamper proof of the true facts about why Negroes live where they do in this school system, did the terms of consolidation as suggested by the Court of Appeals constitute such a departure from the accepted and usual course of equal treatment for all parties in judicial proceedings as to call for an exercise of this Court's power of supervision?

4. This Court having held in Green v County School Board of New Kent County, 391 U.S. at 439, that "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now," was the decision of the Court

of Appeals in conflict with Green in not holding that the word "plan" should include a plan for the $24.8 million school bond issue involved in this case, or in the alternative was this a decision of an important question of Federal constitutional law which has not been, but should be settled by this Court?

5. This Court having held in the Green case (391 U.S. at 438, Footnote 4), "'that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past'", and this Court having also held in Griffin v School Board, 377 U.S. at 233, that Federal Courts have the power to require local authorities "to raise funds" to eliminate racial discriminations, was the decision of the Court of Appeals in conflict with Green and Griffin in not requiring that the bond issue here involved be charged, as a first priority, with eliminating "the discriminatory effects of the past" in connection with schools in Negro neighborhoods?

6. The District Court having dismissed "any claim raised by the pleadings in

this cause that would affect the validity of the 24.8 million dollar bond issue" without specifying what allegations in the complaint were covered by the final judgment of dismissal, and Petitioners here having prayed in their complaint that the bond issue be enjoined "except pursuant to a plan approved in advance by" the Court, and it being provided by Rule 41(b) of the Federal Rules of Civil Procedure that the final judgment here involved "operates as an adjudication upon the merits" and further that "If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)," and no findings having been made below, did the decision of the Court of Appeals so far sanction a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

7. Respondents City of Winston-Salem and Winston-Salem/Forsyth County Board of Education having successfully avoided filing any answer in this case from the time it was originally begun as a pro se

action on June 10, 1968 to the time of argument in the Court of Appeals August 26, 1971, and Petitioners here having prayed that "Defendant City of Winston-Salem be required to submit a plan for approval by the Court, and proceed in accordance with approval of the Court, to eliminate unwholesome surroundings where schools are located in Negro neighborhoods by providing superior municipal services, installing paved streets and other improvements, enforcing building and housing codes, and altering zoning classifications to exclude commercial and industrial uses, and to eliminate slum conditions," did the decision of the Court of Appeals, by not establishing any schedule for the filing of answers by said Respondents and for the trial of this case on the merits ["We have no doubt whatsoever that it was error to dismiss the complaint without a trial. . . It should now be tried without delay." United States v Mississippi, 380 U.S. at Page 143], and by not entering a declaratory judgment against the City under such cases as Hawkins v Town of Shaw, 437 F.2d 1286 (1971) and in view of the undisputed facts of this case,--constitute such a de-

parture from the accepted and usual course of judicial proceedings in Federal desegregation cases as to call for an exercise of this Court's power of supervision?

8. Where it was admitted by Respondents in the pleadings and proceedings below that North Carolina had paid to a private law firm "nearly $80,000 to help preserve and perpetuate" the State's dual school systems, and that Respondent Winston-Salem/Forsyth County Board of Education "as of April 30, 1969, had paid attorneys fees totaling $7,500.00 in the present case" [and also $7,500.00 in the Scott case just to April 30, 1969], which attorney fees Petitioners and the rest of the Negro community were also taxed to help provide, and Petitioners having prayed for a declaratory judgment that payment of attorney fees and legal expenses from such tax funds for Respondents' side of the case without any such payment for Petitioners' side of the case [especially since 28 USC §1654 specifically authorizes Respondents to "plead and conduct their own cases personally"], amounts to a violation of the Equal Protection Clause of the Fourteenth Amendment,—did the decision of the Court of Appeals, by

not entering such a declaratory judgment and by not directing the District Court to enter it, constitute a decision of an important question of Federal constitutional law which has not been, but should be settled by this Court, or in the alternative constitute such a departure from the accepted and usual course of judicial proceedings in school segregation cases as to call for an exercise of this Court's power of supervision?

9. The hallmark of this Court's decisions in school segregation cases, from Brown to Swann, having been that "the courts will be guided by equitable principles" (Brown II, 349 U.S. at Page 300), and the Courts below having stayed the hand of Equity until after the $24.8 million bond issue is sold and having relegated Petitioners to the difficulties and expense ["Equity is rooted in conscience." Hurd v Hodge, 334 U.S. at Page 36, Concurring Opinion] of such challenges as they may be able to make to the individual school construction projects which may be brought forth in the future as charges against the bond issue, did the stay of Equity's hand by the Courts below

amount to such a negation of this Court's command that "the courts will be guided by equitable principles" and such a departure from the accepted and usual course of judicial proceedings as laid down by this Court for school segregation cases, as to call for an exercise of this Court's power of supervision?

10. Under the circumstances and undisputed facts of this case, should this Court exercise its power under 28 USC §2201 to "declare the rights and other legal relations" of the parties pursuant to this Petition, and under 28 USC §2106 to "require such further proceedings to be had as may be just under the circumstances" of this case, and to these ends to grant the writ of certiorari?

CONSTITUTION-STATUTES-RULES

In the context of Rule 23(d) of the Rules of this Court, the provisions of the Constitution and Statutes and Rules of Court set out below are involved in this case.

1. Constitution of the United States:

Due Process and Equal Protection Clauses of Fourteenth Amendment

". . . nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Due Process Clause of 5th Amendment

"No person shall be . . . deprived of life, liberty or property without due process of law . . ."

2. United States Code:

28 USC §1254(1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . ."

28 USC §1291

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

28 USC §1343(3) (4)

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right,

privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

28 USC §1654

"In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

28 USC §2101(c)

"Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

28 USC §2106

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court law-

fully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

28 USC §2201

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

42 USC §1981

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 USC §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. Rules of Court:

Federal Rules of Civil Procedure

Rule 1.- "These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 41(b).- ". . . If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal . . . other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

Rule 43(a)(e).- (a) "In all trials the testimony of witnesses shall be taken orally in open

court, unless otherwise provided by these rules . . ."
(e) "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

Rule 52(a).- "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . Requests for findings are not necessary for purposes of review. . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

Rules of the Supreme Court

Rule 19(1)(b).- "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * * * *

(b) Where a court of appeals . . . has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

STATEMENT OF THE CASE

For the first time in this Court in a school desegregation case, so far as petitioners have discovered, this petition presents squarely for review the question of the accountability of a school bond issue and of state officials having such bonds under their control, for elimination of admitted capital improvement discriminations practiced against public schools in Negro neighborhoods in the past.

Swann v Charlotte-Mecklenburg Board of Education was "primarily concerned with problems of student assignment" (28 L.Ed.2d at 568), but the Court discussed at some length "The construction of new schools and the closing of old ones" (28 L.Ed.2d at 569).

Specifically and concretely involved in this case is a $24.8 million school bond issue.

On June 10, 1968 this case was first begun as a pro se civil action by the grandfather of Petitioners' children, Petitioners' children being grade-school pupils in public schools operated by Respondent Winston-Salem/Forsyth County Board of Education.

The pro se plaintiff grounded his standing upon being a grandfather, a taxpayer being taxed to help support the schools attended by his grandchildren, and a Negro whose race was being discriminated against as a class by Respondents. The District Court held that these grounds of standing were insufficient to sustain the pro se action, and the complaint was dismissed for lack of standing in the pro se plaintiff. The case was appealed to the Court of Appeals for the Fourth Circuit. Atkins v Board of Education of North Carolina, 418 F.2d 874.

While the case was pending in the Court of Appeals, these Petitioners were favored with an opportunity to secure counsel, and the Court of Appeals permitted a brief amici curiae to be filed on behalf of these Petitioners. Without passing upon the standing of of the pro se plaintiff-appellant, the Court of Appeals vacated the judgment of dismissal, and remanded with directions to permit these Petitioners to be substituted as plaintiffs instead of

the pro se plaintiff. On March 26, 1970 a substitute complaint was filed by order of the District Court, the Court of Appeals having said, "Clearly the Allens have standing . . ." 418 F.2d at 876.

The Court of Appeals also said that this case, in the discretion of the District Court, might be consolidated with the so-called Scott case, which came before this Court by petition for certiorari and motion to stay the judgments below, filed August 23, 1971, and being No. 71-274, October Term, 1971. Following the remand, the District Court took no action with reference to consolidation, except to initiate some discussions among the parties, in connection with which the other side took the position that these Petitioners should be held bound in any consolidation by all that had happened or might have happened in the Scott case, to which Petitioners were opposed.

After the filing of the substitute complaint on March 26, 1970, Respondents filed motions to dismiss and for summary judgment which had not been acted upon by the District Court when the second appeal was argued on August 26, 1971,

before the Court of Appeals. In this posture, on March 18, 1971, the Respondent Winston-Salem/Forsyth County Board of Education filed another motion seeking partial dismissal and summary judgment, a copy of which motion is hereto attached as "Exhibit D".

The District Court held a hearing upon this motion for partial dismissal and summary judgment on April 8, 1971, after notice to the parties by telephone on April 6, 1971. At the hearing no evidence of any kind was offered. Counsel for the movant made a statement to the Court which was not transcribed but was in substance comparable to the following from Pages 3-4 of movant's Brief in the Court of Appeals:

> "Because of these allegations in the Complaint, bond counsel has refused to issue a 'no litigation' certificate, which the County must have in order to market the bonds. The plaintiffs have never contended that the bond election was invalid or that the bonds when issued would not be valid obligations of the County of Forsyth."

On Page 6 of said Brief there appears the following statement:

"Should the court below be affirmed, bond counsel has indicated that they will issue their no litigation certificate and the Board of County Commissioners will be able to issue the bonds in its discretion."

Bond counsel did not take the stand at the hearing, and no affidavit or deposition of bond counsel was submitted. The District Court made no special findings of fact and stated no separate conclusions of law.

Allegations of the Substitute Complaint

Included in the substitute complaint are the following items [which "on a motion to dismiss, must of course be taken as true," United States v Shubert, 348 U.S. at 225]:

"1. Substitute plaintiffs . . . are the father and mother and natural guardians of Gail A. Allen, age nine, and Harvey H. Allen, Jr., age eight, who live with their parents and attend public schools operated by defendant Winston-Salem/Forsyth County Board of Education for the State of North Carolina. Substitute plaintiffs appear in this action on their own behalf as parents and on behalf of their children, and also on behalf of other parents and children in North Carolina who are similarly situated."

"2. Substitute plaintiffs are taxpayers who are taxed by North Carolina to help

pay for the support and maintenance of the state's racially dual school systems, separate educational facilities, and school systems with uncorrected effects of segregation. Substitute plaintiffs are natural born citizens of the United States and are members of the class of citizens of more than one million persons who live in North Carolina and who are denominated by the state as Negroes . . ."

"3. Defendant State Board of Education of North Carolina, a body politic and corporate under the laws of the state, is the state's agency for apportioning and distributing the state's Nine Months School Fund and Free Textbooks and also federal funds allotted to the state."

"4. The defendant North Carolina Superintendent of Public Instruction, Charles F. Carroll, and his successor in office, are the officers charged with authority for administering the state's Free Public School System."

"5. Defendant Winston-Salem/Forsyth County Board of Education, a body politic and corporate under the laws of the State of North Carolina, is one of the more than 150 local county and city boards of education, denominated local school administrative units by North Carolina law, through which the state operates its Free Public School System as established by Article IX of the North Carolina Constitution, and which receives state and federal funds allotted by defendant State Board of Education of North Carolina, as well as certain funds which are received directly from federal agencies."

"6. Defendant Board of County Commissioners of Forsyth County, North Carolina, a body politic and corporate under the laws of the State of North Carolina, along with the 99 other boards of county commissioners in North Carolina, is an agency which the state authorizes and requires to provide the capital funds and supplementary current expense funds for local school needs and operations."

"7. Defendant City of Winston-Salem, a body politic and corporate under the laws of the State of North Carolina, possesses the authority for zoning and rezoning the city and enforcing the zoning ordinances of the city, and prior to 1963 defendant City of Winston-Salem operated the public schools within the city under a mandate contained in its charter that the white and Negro schools be segregated. (In 1963, pursuant to chapter 112 of the 1961 North Carolina Session Laws, defendant City of Winston-Salem transferred all of its schools to defendant Winston-Salem/Forsyth County Board of Education.)"

"8. Jurisdiction of this action is founded upon 28 U.S.C. sec. 1343(3) and 2201 and 42 U.S.C. sec. 1981 and 1983, in that this action challenges the operation and maintenance of racially dual school systems and school systems with uncorrected effects of segregation, which constitute badges and relics of slavery in contravention of the Thirteenth Amendment to the Constitution of the United States, and which violate the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States."

"9. . . . All public schools in Winston-Salem which had all-Negro pupils in 1954, and which are still in operation, have all-Negro pupils at the present time; and two or more schools which formerly had all-white pupils now have all-Negro pupils." * * * * *

"11. In locating its Negro schools, defendant City of Winston-Salem chose sites which it had previously zoned for occupancy only by Negroes, and which it had zoned so as to allow multi-family and commercial uses, instead of restricting the area to single-family dwellings; in addition the defendant City of Winston-Salem chose unusually small sites for Negro schools, and located these schools in areas where unpaved streets and inferior municipal services were characteristic. In comparison, the defendant City of Winston-Salem in building its white schools, chose areas which for the most part it had zoned to permit only single family dwellings, selected sites which were for the most part ample, spacious and well landscaped, and located these schools in areas with paved streets and other municipal improvements, and which were and still are accorded superior municipal services. The respective conditions in the locations of Negro and white schools, described herein, prevail and have been accepted by defendant Winston-Salem/Forsyth County Board of Education since its assumption of authority over the schools within the city in 1963, and have been perpetuated by the continued administration of the zoning laws and the provision of public services and improvements by defendant City of Winston-Salem, since that time. Typical of the

unwholesome and inferior conditions surrounding many of the schools attended exclusively by Negro children in Winston-Salem, are those at Atkins High School and Mebane Elementary School, which are described as follows in a report commissioned by defendant Winston-Salem/Forsyth County Board of Education in 1969 from George Peabody College for Teachers, Nashville, Tennessee:

> Page 316-'Atkins High School-Grades 10-12. The neighborhood is rundown and slum conditions surround the school. The school site . . . adjoins a city dump, . . . is poorly landscaped. . . The total school plant is in poor condition. It has the general appearance of neglect.'
>
> Page 295-'Mebane Elementary School-Grades 1-6. The site is inadequate, making it unsatisfactory for parking and playground requirements. It is carved from the side of a hill. It lacks development . . . The environment of the area is depressing.'"

* * * * *

"13. On or about February 29, 1968, defendant Winston-Salem/Forsyth County Board of Education announced a 'six-year school plan,' under which it was proposed to spend $24,800,000 for capital outlays in the school system, principally construction. This plan was to have been financed by a bond issue in the same amount authorized by the voters on March 16, 1968 to be issued by defendant Board of County Commissioners of

Forsyth County. This plan does not include any money for a new Atkins High School or a new Mebane Elementary School; in fact 95 percent of the money was to have been spent in white neighborhoods in connection with bigger and finer white schools, leaving the Negro schools in their present deprived and inferior condition." . . . .

"16. As of June 14, 1968, North Carolina had paid to a private Washington, D.C., law firm the sum of nearly $80,000 to help preserve and perpetuate North Carolina's dual school systems and separate educational facilities; . . . and defendant Winston-Salem/Forsyth County Board of Education as of April 30, 1969, had paid attorneys fees totaling $7,500.00 in the present case, and $7,500.00 in [the Scott case]. All of these attorneys fees and legal expenses have been derived from tax funds which substitute plaintiffs and the other members of the Negro community have been taxed to help provide, while defendants have made no provision out of tax funds or otherwise for attorneys fees and legal expenses to help dismantle the dual school system and separate educational facilities being operated in this state."

"WHEREFORE, Substitute Plaintiffs pray:

"1. For a declaratory judgment that:

(a) It is unconstitutional for North Carolina to support segregated schools, dual school systems, school systems with uncorrected effects of segregation, and separate educational facilities, through the appropriation and distribution of any funds or property whatsoever.

(b) It is unconstitutional for defendants to apportion or distribute to any

schools or school systems any state, local, or federal funds whatsoever, before and unless such school or school system has been desegregated in the sense required by the Constitution.

(c) It is unconstitutional to tax Negroes to help pay attorneys fees and legal expenses to help defend or preserve segregated schools, dual school systems, school systems with uncorrected effects of segregation, and separate educational facilities, at least unless members of the class of substitute plaintiffs are given equal support from public funds to maintain actions for the purpose of eliminating racial segregation and separation in schools.

(d) It is unconstitutional for defendant Board of County Commissioners of Forsyth County, North Carolina, to issue and sell any bonds or to provide proceeds of any bonds, or funds from any other source, to defendant Winston-Salem/Forsyth County Board of Education if such proceeds or funds are to be used in any way to support segregated schools, dual school systems, school systems with uncorrected effects of segregation, and/or separate educational facilities."

"2. For s preliminary and then a permanent injunction providing that:

(a) Defendants be enjoined from apportioning or distributing any state, federal, or local funds to support segregated schools, dual school systems, school systems with uncorrected effects of segregation, and separate educational facilities in North Carolina.

(b) Defendants be required to submit plans for the Court's approval for distribution and use of state, local, and federal funds under their supervision

and control so as to prevent their being expended in school districts which have not eliminated segregated schools, dual school systems, school systems with uncorrected effects of segregation, and separate educational facilities.

(c) Defendant Board of County Commissioners of Forsyth County be enjoined from issuing or selling its proposed bond issue and distributing proceeds of these bonds, or any other funds, to defendant Winston-Salem/Forsyth County Board of Education, except pursuant to a plan approved in advance by this Court.

(d) Defendants be required to deposit with the Clerk of this Court amounts equal to those which defendants have paid out for attorneys fees and legal expenses in this case; that further payment of attorneys fees and legal expenses in this case by defendants be enjoined unless an equal amount be deposited with the Clerk of this Court; and that all amounts thus deposited with the Clerk of this Court be used for substitute plaintiffs' side of the case as the Court may from time to time direct.

(e) Defendant City of Winston-Salem be required to submit a plan for approval by the Court, and proceed in accordance with approval of the Court, to eliminate unwholesome surroundings where schools are located in Negro neighborhoods by providing superior municipal services, installing paved streets and other improvements, enforcing building and housing codes, and altering zoning classifications to exclude commercial and industrial uses, and to eliminate slum conditions."

Respondent Winston-Salem/Forsyth County Board of Education and Respondent City of Winston-Salem have not as yet filed any answer to the substitute complaint, just as they never filed any answer to the original complaint of the pro se plaintiff. In this posture, the motion of Respondent Winston-Salem/Forsyth County Board of Education for partial dismissal and summary judgment was held on April 8, 1971, the motion being entirely "based on facts not appearing of record" [Rule 43(e) of the Federal Rules of Civil Procedure], which facts were concerned exclusively with what bond counsel employed by Respondents had done or might do regarding a no-litigation certificate for the $24.8 million bond issue involved in this case.

It is emphasized that bond counsel did not take the stand at the hearing, and no affidavit or deposition of bond counsel was submitted. Yet the District Court entered its "Order For Final Judgment" ["Exhibit B" hereto attached] and its "Final Judgment (Partial)" ["Exhibit C" hereto attached], on the basis of

that hearing.

The final judgment dismissed "any claim raised by the pleadings in this cause that would affect the validity of the 24.8 million dollar bond issue voted by the people of Forsyth County on March 16, 1968."

Since the District Court did not say what parts of the substitute complaint were covered by the final judgment of dismissal, and since the District Court made no findings of fact, resting the final judgment entirely upon what was in the mind of said bond counsel, conceivably the entire substitute complaint could be considered as dismissed if bond counsel should later say that such was what bond counsel had in mind.

The attention of the Court of Appeals was specifically called to the record that "Defendants have not sought to place any evidence before the Court." [Page 4 of Petitioners' Brief in the Court of Appeals] The Court of Appeals was also advised [Page 6 of said Brief] of the record-fact that "No evidence has been heard by the District Court in this case."

Yet, the Court of Appeals affirmed the decisions of the District Court, and the Petitioners seek review in this Court in keeping with the principle announced in Walling v Reuter, Inc., 321 U.S. at 677:

> "But review of a judgment of the District Court contemplates more than a consideration of the case by the Circuit Court of Appeals alone. The losing party in that court may secure further review here upon certiorari, if he so desires and if this Court, in its discretion, grants the writ."

After the former appeal (418 F.2d 874), when the suggestion of the Court of Appeals for possible consolidation of this case with the Scott case was considered, Respondents insisted that Petitioners must be bound by everything that had happened or that might have happened in the Scott case.

At the argument upon this second appeal, the Court of Appeals inquired further as to Petitioners' attitude toward consolidation. Upon the assumption that any further suggestion by the Court of Appeals to the Dis-

trict Court concerning consolidation would carry equal protection for all parties, Petitioners indicated that they would not then be opposed. But, when the Court of Appeals came to write its Opinion ("Exhibit A" hereto attached), it said that consolidation "would seem appropriate if the interest of the plaintiffs in the Scott case would not be adversely affected by it," without any protection for the interests of these Petitioners.

Whatever position the District Court may take regarding the suggestion of the Court of Appeals for consolidation, it is the feeling of these Petitioners that this preference for "the interest of the plaintiffs in the Scott case" should not remain upon the record, and hence Petitioners seek relief from that preference in this Court.

Racial Discrimination in the Busing Program Operated by Respondent Winston-Salem Forsyth County Board of Education

The Respondent Winston-Salem/Forsyth County Board of Education, pursuant to approval of the District Court according

to mandate of the Court of Appeals, now has in effect a desegregation plan that involves considerable busing of pupils.

These busing operations include massive racial discriminations as between white and Negro pupils. One example is the busing of all Negro pupils in Grades 1-4 from the neighborhoods where they live to distant schools all over Forsyth County, while all white pupils in Grades 1-4 are assigned to schools nearest the neighborhoods in which they live, and mostly without busing.

Another example is found in the senior high schools. Over the years of total segregation in the schools, four senior high schools were constructed in Negro neighborhoods and Respondents always claimed that they were equal to the white senior high schools. When, however, five integrated senior high schools were being selected in the summer of 1971, Respondent Winston-Salem/Forsyth County Board of Education found that not one of these four schools in Negro neighborhoods was fit to be an integrated senior high school, and so four of the needed five integrated senior

high schools were located in schools out in the County of Forsyth beyond the city limits, with the fifth senior high school located in a school in a white residential area in the western section of the city.

The result is gross discrimination against Negro senior high school students in being mostly bused away from the neighborhoods where they live inside the city to distant senior high schools, all in white residential areas, while no white students are bused to a senior high school in a Negro neighborhood.

The Negro population inside the City of Winston-Salem (45,533 under the 1970 Census) is more than half the total white population of Forsyth County outside the city (79,143 under the 1970 Census), yet four of the five senior high schools are located in white neighborhoods out in the County, but not one is located in a Negro neighborhood inside the city.

When challenged in the Court of Appeals about its busing discriminations, Respondent Winston-Salem/Forsyth County

Board of Education replied [Page 19 of its Brief in the Court of Appeals] that it "has equalized the transportation burden among the black and white students as much as it could and still achieve a racial balance in each school in the system." Said Respondent also told the Court of Appeals on Page 3 of said Brief that its desegregation "plan provides that in every public school in the system, the proportion of black to white students shall approximate the proportion in the system as a whole."

Moreover, said Respondent also told the Chief Justice in its motion for a stay in No. 71-274 of the October Term, as reflected in the Chief Justice's Opinion of August 31, 1971, denying the stay, that it adopted its desegregation and busing plan "under protest, on an understanding that it was required to achieve a fixed 'racial balance' that reflected the total composition of the school district."

However, it is now known that the ratio of Negro to white students in fact ranges from a minimum of at least 18 percent to a maximum of at least 36 percent.

A R G U M E N T

In the context of Rule 23(h) of the Rules of this Court, the following argument amplifies the reasons relied upon under Rule 19 for allowance of the writ of certiorari.

I. FINAL JUDGMENT WITHOUT EVIDENCE.

It seems to be well settled by the decisions of this Court that it is a denial of due process of law to enter a final judgment without evidence. Ohio Bell Telephone Co. v Public Utilities Commission, 301 U.S. 292, 57 S.Ct. 724, 81 L. Ed. 1093 (1937), Thompson v Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d, 654 (1960), Garner v Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961).

In the Ohio Bell case (301 U.S. at 300) this Court held:

> "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record."

The final judgment in this case was based entirely upon "evidential facts not spread upon the record," namely, matters pertaining to what bond counsel

employed by Respondents had done or might do in connection with the $24.8 million school bond issue involved in this case. Said bond counsel did not take the stand and no affidavit or deposition from the bond counsel was submitted at the hearing of the motion for dismissal and summary judgment.

The decision of the Court of Appeals affirming the District Court's final judgment entered without evidence was thus in conflict with the above applicable decisions of this Court.

II. SCHOOL CONSTRUCTION AS TOOL OF DESEGREGATION.

This is the first case in this Court where the use of school construction as a device for imposing segregation and as a possible tool for school desegregation has been concretely and specifically brought before the Court. A $24.8 million school bond issue is here involved.

However, the general principles to be applied to school construction in school desegregation cases were outlined by this Court in Swann v Charlotte-Mecklenburg Board of Education, supra.

In Swann (28 L.Ed.2d at 568), this Court said:

> "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to . . . the quality of school buildings and equipment . . . a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown."

It is not disputed in this case that "it is possible to identify a 'white school' or a 'Negro school' simply by reference to . . . the quality of school buildings and equipment" in Winston-Salem. On Page 17 of its Brief in the Court of Appeals Respondent Winston-Salem/Forsyth County Board of Education said:

> "Thus, even if the allegations of the Complaint are taken as true and it is assumed that the Board of Education has discriminated in the construction of facilities in the past, there would be no justification for an order requiring it to submit a 'plan' for the expenditure of the entire proceeds of the bond issue."

In Swann (28 L.Ed.2d at 569) this Court said:

> "In the past, choices in this respect [with reference to

> school construction and closing] have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since Brown, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.'"

This is not an inaccurate picture of the history of school construction and closing in Winston-Salem, where the facts are of such widespread and common knowledge that the Court may take judicial notice of them. [See the Ohio Bell case, supra, 301 U.S. at 301.]

The classic case of a school closing was that of the closing of the perfectly good Gray Senior High School [which is still in use by the North Carolina School of the Arts] "which appeared likely to become racially mixed through

changes in neighborhood residential patterns." When Gray Senior High School was closed in 1965, it was replaced by the Parkland Senior High School, which was built so far "from Negro population centers" that the busing of the Gray students to the new Parkland was part of the plans for the opening of this new facility, despite the fact that some of the white students being bused to Parkland were within comfortable walking distance from the Negro Anderson Senior High School. [The deprived and inferior condition of the Anderson Senior High School and its next door neighbor, the Mebane Elementary School, is described above at Page 26.]

Respondents do not dispute the "deprived and inferior condition" of schools in Negro neighborhoods, as alleged in the substitute complaint [Page 26, supra] and admitted by the motions to dismiss. What is denied is the duty to give any priority or to submit any plan for correcting the past discriminations against schools in Negro neighborhoods. Indeed, as is shown by Page 6 of the Minutes of the meeting of Respondent Winston-Salem/Forsyth County Board of Education held

on October 25, 1971, "top priority" has been given [with authority to "the Staff to proceed with finite plans including architects, sites, and any other considerations necessary to proceed promptly"] to a "Career Center", which is a new program never before operated in the School System; to a "Vocational Rehabilitation Center", in which program 352 students were enrolled in the 1969-70 school year; and to an "Administrative Center" for the comfort and convenience of administrators. Not a word was said about the "deprived and inferior condition" of schools in Negro neighborhoods, and no priority has ever been given to such schools.

It is a fact of common knowledge in Winston-Salem and Forsyth County that much of the opposition to busing arises from objections to the "deprived and inferior condition" of schools in Negro neighborhoods.

Petitioners respectfully submit that the decision of the Court of Appeals in affirming the final judgment of the District Court is in conflict with the principles of the applicable decision of this Court in Swann v Charlotte-Mecklenburg Board of Education, supra.

III. PREFERENCE FOR ONE SIDE IN A SUGGESTED CONSOLIDATION.

The Court of Appeals again suggested to the District Court, as it had done upon the former appeal [418 F.2d 874], the consolidation of this case with the so-called Scott case, that came to this Court by petition for certiorari and motion for stay in No. 71-274 of the October, 1971, Term. The Court of Appeals said ["Exhibit A" hereto attached] that such consolidation "would seem appropriate if the interest of the plaintiffs in the Scott case would not be adversely affected by it," but without any such protection for the interests of these Petitioners.

In discussions about consolidation after the former appeal, Respondents took the position that Petitioners in any consolidation should be held bound by everything which had happened or that might have happened in the Scott case, but Petitioners opposed this and the District Court took no action in the matter.

At the argument upon the second appeal, which is here involved, the Court of Appeals again raised the question of

consolidation, and upon the assumption that if the Court of Appeals should again suggest consolidation it would lay down equal ground rules for all, Petitioners then answered that there would now be no objection to consolidation. However, when the opinion came down, it included the preference quoted above, and Petitioners seek relief from that preference here. One illustration will indicate how disadvantageous it would be if Petitioners should become bound by everything which did happen or that might have happened in the Scott case.

When Shelley v Kraemer, 334 U.S. 1, was decided by this Court on May 3, 1948, massive racial restrictive covenants fairly encircled "the racial concentration of Negroes" in Winston-Salem, but these racial restrictive covenants were not called to the attention of the District Court in the trial of the Scott case. Undoubtedly, if the District Court had known of such massive racial restrictive covenants, it is quite unlikely that it would have made the finding, so strongly emphasized by Respondent Winston-Salem/Forsyth County Board of Education in its motion before

the Chief Justice seeking a stay in the Scott case, as shown in the Chief Justice's Opinion of August 31, 1971, "that the racial concentration of Negroes was not caused by public or private discrimination or state action but by economic factors and the desire of Negroes to live in their own neighborhoods rather than in predominantly white neighborhoods."

Petitioners seek this Court's intervention to prevent res judicata from erecting an insuperable barrier to the real truth about "the racial concentration of Negroes" in Winston-Salem.

Under the circumstances of this case, Petitioners believe that the preference which the Court of Appeals accorded to the plaintiffs in the Scott case in its possible consolidation with this case, was such a departure from the accepted and usual course of equal treatment for all parties in judicial proceedings as to call for an exercise of this Court's power of supervision.

IV. MEANING OF WORD "PLAN" IN GREEN CASE.

In Green v County School Board of New Kent County, 391 U.S. 430,439, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), this Court

held:

> "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."

Respondents contend that the word "plan" in Green is limited to student assignments, and does not reach the "violation of substantive constitutional rights under the Equal Protection Clause" which this Court said in the Swann case (28 L.Ed.2d at 568) is shown, "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to . . . the quality of school buildings and equipment."

On Page 16 of said Brief of Respondent Winston-Salem/Forsyth County Board of Education, it is said:

> "Of course, Green . . . and Swann... obligate the local Board of Education to produce a plan for desegregation . . . It does not follow that because the Board of Education must produce a plan for desegregation, it must also produce a plan for the expenditure of all 24.8 million dollars of the bonds. . . ."

This strained attempt to draw a false

and unrealistic distinction between the "violation of substantive constitutional rights" in student assignments and the "violation of substantive constitutional rights" in school construction, just will not wash, because in the first place this Court also said in Swann (28 L.Ed.2d 566) "That judicial powers may be exercised only on the basis of a constitutional violation." If the exercise of remedial "judicial powers" is available in the "constitutional violation" involving student assignments, then the exercise of remedial "judicial powers" should also be equally available for relief from just as serious a "constitutional violation" in connection with school construction.

Petitioners respectfully submit that the decision of the Court of Appeals is in conflict with the applicable decisions of this Court in Green and Swann, or in the alternative this interpretation of the word "plan" in Green amounts to a decision of an important question of Federal constitutional law in school segregation cases which has not been, but should be settled by this Court.

V. BONDS TO ELIMINATE EFFECTS OF PAST.

In the Green case, supra (391 U.S. at 438, Footnote 4), this Court said:

> "'We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discriminations in the future.' Louisiana v. United States, 380 U.S. 145,154."

In Griffin v County School Board of Prince Edward County, 377 U.S. 218,233, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964), this Court held:

> ". . . the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia."

Petitioners respectfully submit that the Green and Griffin cases lay a duty upon Respondents to eliminate the discriminatory effects of the past in school construction as well as in other areas of school operations, and that the decision of the Court of Appeals in its

failure to direct that the $24.8 million school bond issue be used to eliminate the discriminatory effects of the past was in conflict with the applicable decisions of this Court in Green and Griffin.

VI. DISMISSAL ON MERITS WITHOUT FINDINGS.

Rule 41(b) of the Federal Rules of Civil Procedure provides in part:

> "(b) Involuntary Dismissal: Effect Thereof. . . . If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits.",

Rule 52(a) provides in part that "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . ."

No such findings of facts were made specially and no such conclusions of law were stated separately in this case, and the Court of Appeals' affirmance of

the final judgment in this case was thus sanction for such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

VII. "JUST, SPEEDY, AND INEXPENSIVE DETERMINATION OF EVERY ACTION."

Rule 1 of the Federal Rules of Civil Procedure provides in part:

> "These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action."

Respondents have thwarted and frustrated this objective of Rule 1:

Respondents Winston-Salem/Forsyth County Board of Education and City of Winston-Salem have succeeded in avoiding filing any answers to the Petitioners' substitute complaint, just as they succeeded in avoiding filing any answers to the original complaint of the pro se plaintiff which was filed on June 10, 1968.

Said Respondents have succeeded in avoiding answers to practically all interrogatories and requests for admissions.

Petitioners respectfully suggest that the decision of the Court of Appeals has

given sanction to such delays and inequalities and therefore constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

VIII. TAXING NEGROES FOR ATTORNEY FEES AND LEGAL EXPENSES OF RESPONDENTS.

It is not disputed that Respondents are paying their attorney fees and legal expenses out of tax funds which Petitioners and the rest of the Negro community are also taxed to help provide. It was so alleged in the substitute complaint and admitted to be true by the motions to dismiss.

On Page 25 of its Brief in the Court of Appeals, Respondent Winston-Salem/Forsyth County Board of Education said:

> "At this point, the plaintiffs are no more entitled to fees than are the defendants and it cannot be predicted at this point whether they will be any more entitled to fees at the conclusion of the litigation than the defendants."

That poses the exact question which is here involved: the equal treatment of both sides in dispensing for attorney fees and legal expenses the tax funds

which Petitioners and the rest of the Negro community are also taxed to help provide. While taking their attorney fees and legal expenses out of such tax funds as they go along, thus making it possible for them to make the strongest possible case against the constitutional rights of Petitioners in particular and the Negro community in general, Respondents tell Petitioners to wait until "the conclusion of the litigation" to see about attorney fees and legal expenses for Petitioners' side of the case, while fees and expenses for Respondents' side of the case are made available out of such tax funds as the litigation proceeds.

In Sparrow v Gill, 304 F.Supp. 86,90 (1969), a Three-Judge Federal Court in the Middle District of North Carolina held:

> "No one has a constitutional right to ride a school bus. His is merely the right not to be excluded from a benefit which is conferred by the state upon fellow citizens whose claim to it is no more 'reasonable' than his."

In Newman v Piggie Park Enterprises, 390 U.S. 400,402, 88 S.Ct. 964, 19 L. ed.2d 1263, this Court said with reference to plaintiffs in cases like this:

> "When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."

Besides, 28 USC §1654 gives an unrestricted right to Respondents, just as it does to Petitioners, to "plead and conduct their own cases personally;" and hence their claim to attorney fees and legal expenses out of such tax funds is no more "reasonable" than is that of the Petitioners.

Petitioners alleged in their substitute complaint that "it is unconstitutional to tax Negroes to help pay attorneys fees and legal expenses" for Respondents' side of the case, while denying such tax funds for Petitioners side of the case.

Petitioners therefore respectfully submit that the decision of the Court of

Appeals in this case affirming the final judgment of the District Court, is inconsistent with the Sparrow and Newman cases, supra, and amounts to the decision of an important question of Federal constitutional law which has not been, but should be settled by this Court.

IX. EQUITY AS GUIDE TO DESEGREGATION.

From Brown to Swann, the watchwords of desegregation cases in this Court have been "Equity" and "equitable principles." But one would not recognize this in the documents filed by Respondents in this case. Respondents have treated this case as governed entirely by the old common law.

On Page 9 of said Brief in the Court of Appeals it is said:

> "In summary, the plaintiffs allege that the local Board operates a segregated system and that the plan announced prior to the bond election of March, 1968, would perpetuate that system and was discriminatory in that it provided for 95 percent of the funds to be spent for 'white' schools."

Yet, while admitting these allegations to be true, it is said on Page

17 of said Brief:

> "Thus, even if the allegations of the Complaint are taken as true and it is assumed that the Board of Education has discriminated in the construction of facilities in the past, there would be no justification for an order requiring it to submit a 'plan' for the expenditure of the entire proceeds of the bond issue."

Assuming that this would be a proper argument to address to a traditional court of common law, it is certainly not the kind of argument which should be addressed to the conscience of the Chancellor sitting in a Court of Equity. Especially is this true since it is conceded that Respondents have promoted and operated a state-imposed segregated school system, and that there has been gross racial discrimination in capital improvements practiced against schools in Negro neighborhoods.

Under these circumstances, Petitioners respectfully submit that the decision of the Court of Appeals and its affirmance of the final judgment of the District Court constituted such

a departure from the accepted and usual course of judicial proceedings in school segregation cases as to call for an exercise of this Court's power of supervision.

X. DECLARATORY JUDGMENTS BY SUPREME COURT.

In Tinder v United States, 345 U.S. 565, 570, 73 S.Ct. 911, 97 L.Ed. 1250 (1953) it is held:

> "This Court has power to do justice as the case requires. 28 USC §2106."

In Headnote 3 of Public Service Commission v Wycoff Co., 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952) it is said:

> "The appropriateness of declaratory relief under the Federal Declaratory Judgment Act of 1934 (28 USC §2201) may be determined by the Supreme Court of the United States though not considered either in the District Court or the Court of Appeals."

Under the circumstances of delay and hardship fostered by Respondents in this case, Petitioners believe that they are justified in urging this Court to enter directions for declaratory relief in this case, and to grant the writ of certiorari in order to consider this

request. The following are the types of declaratory relief which Petitioners believe to be appropriate in this case:

1. That it was a denial of due process under the Fourteenth Amendment for the Court of Appeals to affirm the final judgment of the District Court, which final judgment was entered without hearing any evidence to support it.

2. That it would be a denial of the equal protection of the laws and of due process under the Fourteenth Amendment for the City of Winston-Salem to fail to correct and eliminate the deprived and inferior conditions which it created around schools in Negro neighborhoods in the Winston-Salem/Forsyth County School System, under the principles of constitutional law decided in such cases as Hawkins v Town of Shaw, 437 F.2d 1286, 1292 (1971):

> "The town of Shaw, indeed any town, is not immune to the mandates of the Constitution. . . . 'A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due

process of law.'"

3. That the decision of this Court in the Green case (391 U.S. at 439) that "The burden on a school board today is to come forward with a plan" includes a plan for the $24.8 million school bond issue involved in this case.

4. That this Court's decision in Green (391 U.S. 438, Footnote 4), that "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past" requires that the first priority for the $24.8 million school bond issue involved in this case must be to eliminate completely all of the discriminatory effects of past inequalities of capital expenditures for schools in Negro neighborhoods.

5. That it is a denial of equal protection of the laws under the Fourteenth Amendment to tax Petitioners and the rest of the Negro community to help pay the attorney fees and legal expenses of Respondents without providing an equal amount from such tax funds for Petitioners' side of this case.

6. That, this Court having said in the Swann case (28 L.Ed.2d at 572) in connection with the requirement of "an optional majority-to-minority transfer provision," that "In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move," Respondents are under an affirmative duty under the Fourteenth Amendment at once to make every school in the school system offering particular grades completely equal in every respect to every other school offering the same grades or programs in the school system, so that the rights vouchsafed by this transfer requirement may not be frustrated by inequalities which are present in the school to which the student wishes to move.

7. That Respondents cannot be in full compliance with their affirmative constitutional duties unless and until their "normal administrative practice should produce schools of like quality, facilities, and staffs" (Swann, supra, 28 L.Ed.2d at 568) in all schools

offering the same grades or programs in the school system.

8. That it is a denial of equal protection and due process under the Fourteenth Amendment for Respondents to impose any substantially greater burden of busing upon Negro students than is imposed upon white students in the same grades or programs in the school system.

9. That Respondents cannot be in full compliance with their affirmative constitutional duties unless they are providing free transportation, or making it available, for every student who is similarly situated with any other student for whom free transportation is provided or made available by Respondents.

WHEREFORE, Petitioners pray:

1. That this Court grant the petition for writ of certiorari because the Court of Appeals (a) has decided important questions of federal law which have not been, but should be, settled by this Court; and (b) has decided federal questions in a way in conflict with applicable decisions of this Court; and (c) has in some instances so far departed from the accepted and usual course of

judicial proceedings in school desegregation cases and so far sanctioned such departure by the District Court as to call for an exercise of this Court's power of supervision.

2. That, because of the special facts and circumstances of this case, this Court exercise its "power to do justice as the case requires" under 28 USC §2106, and direct the entry of the declaratory judgments suggested above.

3. That this Court take judicial notice of matters of common knowledge in this case, such as the massive racial restrictive covenants which fairly encircled "the racial concentration of Negroes" in Winston-Salem/Forsyth County when Shelley v Kraemer was decided by this Court on May 3, 1948.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1563

"Exhibit A"

Harvey H. Allen and Simona A. Allen,

Appellants,

versus

State Board of Education of North Carolina; Charles F. Carroll, etc.; Winston-Salem/Forsyth County Board of Education; Board of County Commissioners of Forsyth County; and City of Winston-Salem, North Carolina,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

Argued August 26, 1971. Decided September 9, 1971.

Before Haynsworth, Chief Judge, and Winter and Russell, Circuit Judges.

Norman B. Smith (Smith and Patterson on brief), for Appellants, and Paul Eugene Price, Jr., County Attorney for Forsyth County, (Robert K. Leonard, Attorney for Board of County Commissioners of Forsyth County, on brief) and William F. Womble (Womble, Carlyle, Sandridge and Rice, and John L. W. Garrou on brief) for Appellees.

Per Curiam:

"Exhibit A"

In this school case the plaintiffs, among other relief, sought to restrain the issuance and sale of school bonds. They raised no question concerning the validity of the bond referendum or the authorization of the bond issue. The relief sought stems entirely from an expression of concern that the proceeds of the bond issue might be spent in such a way as to encourage a segregated school system.

The District Court granted a partial summary judgment, entering a final order in which it was held that any present or future controversy which may exist over the expenditure of the proceeds of the school bond issue does not affect their validity, the right of the county to issue them, or its obligation to pay the principal and interest as they become due. The District Court retained jurisdiction over the remainder of the case, and issuance and sale of the bonds will in no way impair its jurisdiction to pass upon the appropriateness of the School Board's construction plans when they are developed.

The District Court was entirely correct in acting as it did to remove the cloud which the pendency of this

claim created on the sale and issuance of the school bonds.

This same school district is involved in another school desegregation case which was recently before this court. Scott v. Winston-Salem/Forsyth County Board of Education, 4 Cir., ___F.2d___ (June 10, 1971). That case was remanded to the District Court for further proceedings for the final achievement of a unitary system. The Scott case involves some of the issues remaining in this case.

When this case was here before,* we suggested a consolidation of this case with the Scott case. We are informed that the School Board moved for a consolidation of the two cases, but the plaintiffs in each of the cases objected. The plaintiffs' counsel in this case inform us, however, that they now would favor a consolidation. Such a step would seem appropriate if the interest of the plaintiffs in the Scott case would not be adversely affected by it. The change in position of the plaintiffs in this case would seem to warrant reconsideration of the matter of consolidation in the District Court.

"Exhibit A" Affirmed.

* Atkins v. State Board of Education, 4 Cir., 418 F.2d 874.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

"Exhibit B"

Harvey H. Allen and Simona A. Allen, Substitute Plaintiffs, v. State Board of Education of North Carolina, et al., Defendants.	)	Civil Action No. C-79-WS-68

ORDER FOR FINAL JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in this action presents no claim that affects the validity of the 24.8 million dollar bond issue voted by the people of Forsyth County on March 16, 1968, or of the procedures by which said bond issue was presented to the voters and by which the election was held and that, upon the issues which have been raised by the pleadings in this cause, this Court will enter no order or judgment that would affect the validity of said bonds or the obligation of the County of Forsyth to pay the principal and interest on said bonds as they become due, and to the extent the Complaint presents such a claim, the claim is dismissed, and the undersigned expressly determines that there is no just reason for delay in the entry of final judgment on this order and the Clerk of this

Court is hereby directed that final judgment be entered upon this order as to said claim.

This the 20th day of April, 1971. "Exhibit B"

/s/ Eugene A. Gordon
Eugene A. Gordon
United States District Judge

****

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

Harvey H. Allen and Simona A. Allen, Substitute Plaintiffs,	)	"Exhibit C"
v.	)	Civil Action No. C-79-WS-68
State Board of Education of North Carolina, et al., Defendants.	)	

FINAL JUDGMENT
(PARTIAL)

THIS CAUSE coming on to be heard before The Honorable Eugene A. Gordon, United States District Judge for the Middle District of North Carolina, upon the motion of defendant, Winston-Salem/Forsyth County Board of Education for a Final Judgment that the Complaint in this action presents no claim that affects the validity of the 24.8 million dollar bond issue voted by the people of Forsyth County on March 16, 1968, or

the obligation of the County of Forsyth to pay the principal and interest on said bonds when they become due and the Court having entered such an order and having expressly determined that there is no just reason for delay in the entry of final judgment on that order, and having directed the Clerk to enter judgment in accordance with said order;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that any claim raised by the pleadings in this cause that would affect the validity of the 24.8 million dollar bond issue voted by the people of Forsyth County on March 16, 1968, or the obligation of the County to pay the principal and interest on said bonds as they become due be and hereby is dismissed.

This the 5th day of May, 1971. "Exhibit C"

/s/ Eugene A. Gordon
Eugene A. Gordon, United States District Judge

****

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WINSTON-SALEM DIVISION

HARVEY H. ALLEN and SIMONA A. ALLEN,	)	"Exhibit D"
Substitute Plaintiffs	)	Civil Action No. C-79-WS-68
vs.	)	MOTION
STATE BOARD OF EDUCATION OF NORTH CAROLINA, et al.,	)	
Defendants	)	

Defendant Winston-Salem/Forsyth County Board of Education, moves:

(1) That final Summary Judgment be entered pursuant to Rules 54(b) and 56 of the Federal Rules of Civil Procedure that the Complaint presents no claim that could affect the validity of the 24.8 million dollar bond issue passed by the voters of Forsyth County on March 16, 1968.

(2) That the Court expressly determine that there is no just reason for delay in the entry of such judgment and that the Court direct the entry of judgment pursuant to Rule 54 of the Federal Rules of Civil Procedure.

W. F. Womble

John L. W. Garrou

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
DEC 31 1971
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-733

HARVEY H. ALLEN and SIMONA A. ALLEN,
Petitioners,

v.

STATE BOARD OF EDUCATION OF NORTH CAROLINA; WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION; BOARD OF COUNTY COMMISSIONERS OF FORSYTH COUNTY, and CITY OF WINSTON-SALEM, NORTH CAROLINA,
Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

BRIEF OF RESPONDENTS, WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION AND CITY OF WINSTON-SALEM, NORTH CAROLINA, IN OPPOSITION TO CERTIORARI

****

Counsel for Respondents, Winston-Salem/Forsyth County Board of Education and City of Winston-Salem, North Carolina

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. _____

HARVEY H. ALLEN and SIMONA A. ALLEN,
Petitioners,

v.

STATE BOARD OF EDUCATION OF NORTH CAROLINA; WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION; BOARD OF COUNTY COMMISSIONERS OF FORSYTH COUNTY, and CITY OF WINSTON-SALEM, NORTH CAROLINA,
Respondents.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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BRIEF OF RESPONDENTS, WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION AND CITY OF WINSTON-SALEM, NORTH CAROLINA, IN OPPOSITION TO CERTIORARI

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STATEMENT OF THE CASE

This is a school desegregation case brought originally by J. Alston Atkins on June 10, 1968. Mr. Atkins alleged that he was the grandfather of children in the public school system, a taxpayer and a Negro. The defendants moved to dismiss the Complaint because the plaintiff had no standing to sue. The District Court, Judge Edwin M. Stanley presiding, granted the motions and the plaintiff appealed. Immediately prior to oral arguments in the Court of Appeals, the present plaintiffs joined in the appeal and asserted that they would intervene as parties plaintiff should the Court think it necessary in order to grant standing. The Court of Appeals for the Fourth Circuit vacated the judgment of the District Court, upon the assertion that the intervenors would be substituted as parties plaintiff. Atkins v. State Board of Education, et al., 418 F.2d 874 (4th Cir. 1969).

More than a month after the decision of the Court of Appeals, the present plaintiffs moved to file a substitute complaint in the action in the District Court and the motion was granted.

In October of 1968, other plaintiffs (Catherine Scott, et al.) filed a different

action asking for the desegregation of the Winston-Salem/Forsyth County public schools. The Scott case was heard on the merits, appealed to the Court of Appeals for the Fourth Circuit, and that Court rendered a decision on June 10, 1971, remanding the case to the District Court for the submission of a revised plan to achieve greater desegregation. Scott v. Winston-Salem/Forsyth County Board of Education, 444 F.2d 99 (4th Cir. 1971).

The respondent, Winston-Salem/Forsyth County Board of Education submitted such a plan to the District Court; the Court approved the plan and ordered it implemented as of the beginning of the 1971-72 school year. The plan provides that in every public school in the system, the proportion of black to white students shall approximate the proportion in the system as a whole. The Board of Education had previously reassigned teachers so as to achieve a ratio of black to white teachers in each school approximating that in the system as a whole. The Board of Education petitioned to this Court for a writ of certiorari to the Court of Appeals to review the decision of that Court remanding the case for the submission of a plan (Winston-Salem/Forsyth County Board of Education v. Scott, No. 71-274) and at the same time

applied to the Chief Justice for a stay of the order on mandate of the Court of Appeals and the orders of the District Court until the petition could be acted upon. Both the application for a stay and the petition for certiorari have been denied. Thus, as of the 1971-72 school year, a plan is in effect in the Winston-Salem/Forsyth County School System which calls for extensive busing of pupils in order to achieve a majority white enrollment in each school in the system with the ratio of blacks in each school ranging from 18 to 41 percent.

Among the allegations of the substitute plaintiffs' complaint in this action is that the local Board of Education proposed to spend the proceeds from a 24.8 million dollar bond issue in a discriminatory manner. The plaintiffs contend that the money should be spent in some manner other than that originally proposed by the Board of Education prior to the bond election in March of 1968. Because of these allegations in the complaint, bond counsel refused to issue a "no litigation" certificate, which the County of Forsyth must have in order to market the bonds. The plaintiffs have never contended that the bond election was invalid or that the bonds when issued would not be valid obligations of the County of Forsyth. Nevertheless, the filing of the complaint by

the plaintiffs has amounted to an injunction against not only the expenditure of the proceeds of the bond issue, but the issuance of the bonds themselves. The District Judge directed the parties to confer to see if they could agree upon some procedure for the issuance of the bonds and the expenditure of at least some of the proceeds. The parties did confer but could reach no agreement. The respondent, Winston-Salem/Forsyth County Board of Education, filed a motion in the District Court asking that Court to declare that the validity of the bonds was not an issue in the case and to enter a judgment pursuant to Rule 54 which would set to rest any future claim as to the validity of the bonds. The motion was granted and the plaintiffs appealed. The Court of Appeals for the Fourth Circuit affirmed the District Court in a per curiam decision stating that "the District Court was entirely correct in acting as it did to remove the cloud which the pendency of this claim created on the sale and issuance of the school bonds." Allen v. State Board of Education, et al., 447 F.2d 960 (4th Cir. 1971).

ARGUMENT

I. Issue Raised by the Appeal to the Circuit Court of Appeals.

The only issue before the Court of Appeals and the only issue decided by it was whether or not the District Court had acted properly in rendering the Judgment that it entered, that is, whether or not the Court below had erred in deciding that no issue touching on the validity of the bonds was raised by the plaintiffs' complaint. Clearly, the Court of Appeals was correct in upholding the District Court. Not only does the complaint not bring into question the validity of the bond issue, but the plaintiffs have never even contended that the bond issue was invalid, either in the District Court, the Court of Appeals or in their Petition for certiorari. The only purpose of the motion in the District Court was to have the Court judicially determine that the complaint raises no issue as to the validity of the bonds, and thereby to induce bond counsel to issue their no-litigation certificate which would make the bonds marketable.

Assuming the plaintiffs stated in their complaint a valid claim for which

relief could be granted, no issue raised in the complaint has been foreclosed by the judgment of the Court below or its affirmance by the Court of Appeals. The points discussed in the petition have no bearing on the issue raised in the Court of Appeals. The prolix statement of the questions presented for review by the petitioners should not obscure the simplicity of the issue presented to the Court of Appeals and the real question that would come before this Court should it grant the petition--whether the Court of Appeals erred in affirming the judgment of the District Court that "the complaint in this action presents no claim that affects the validity of the 24.8 million dollar bond issue voted by the people of Forsyth County on March 16, 1968, or of the procedures by which said bond issue was presented to the voters and by which the election was held and that, upon the issues which have been raised by the pleadings in this case, this Court will enter no order or judgment that would affect the validity of said bonds or the obligation of the County of Forsyth to pay the principal and interest on said bonds as they become due, and to the extent the complaint presents such a claim, the claim is dismissed." Neither the respondents, the District Court, the

Court of Appeals, nor the petitioners have found or alleged that there exists in this action such a claim for the invalidity of the bond issue and the only effect of the decisions of the courts below is to express this unanimous conclusion in the form of a judgment so that the Board of County Commissioners could, if it wishes, proceed to the matter of issuing the bonds.

Up until the time that the District Court entered its partial judgment, the plaintiffs' complaint had had the effect of an injunction against the issuance of the bonds, thus giving the plaintiffs much more than they would be entitled to even if they ultimately prevailed on the merits. Taking each allegation of the complaint as true, the most that the plaintiffs would be entitled to would be an injunction against each new construction project until its effect on desegregation could be measured. We know of no case and the plaintiffs have cited none where an injunction against the expenditure of any monies until a "plan" for the expenditure of all available monies was submitted for approval by the Court has been granted. The Board of County Commissioners has available to it alternate means of financing new school construction. Because

the electorate authorized the issuance of a particular amount of bonds does not mean that the Board of County Commissioners is or should be bound to authorize the issuance of the entire amount. The funds for needed facilities may be derived from other sources; the amount of bond funds which will actually have to be expended is uncertain. There are many factors which could affect the Board of County Commissioners in the exercise of its discretion to issue or not to issue the bonds, or to issue all or any part of them. Thus, even if the allegations of the complaint are taken as true and it is assumed that the Board of Education has discriminated in the construction of facilities in the past, there would be no justification for an order requiring it to submit a "plan" for the expenditure of the entire proceeds of the bond issue.

Under the decision of the Court of Appeals and the District Court, the petitioners will remain perfectly free to challenge any capital improvement projects proposed by the Board of Education on the grounds that it will work a discrimination against their class. That is all they have ever been entitled to under the law and the Court of Appeals was clearly correct in affirming the elimination of a peripheral

issue that has had devastating effect in preventing the issuance of the bonds during a time of rising interest rates and construction costs.

II. Certiorari to Review the Limited Decision of the Court Below Would be Inappropriate.

The decision of the District Court, as affirmed by the Court of Appeals was essentially one of interpretation of the Complaint. Did the Complaint bring into question the validity of the bonds? The District Court decided that it did not, the Court of Appeals agreed, and that is all that the decisions below decide. These decisions were clearly correct, as everyone admits.

The partial judgment of the District Court, affirmed by the Court of Appeals, merely makes possible the issuance of the bonds in such amount (up to 24,8 million dollars) as the County Commissioners shall determine. It adjudicates neither the amount of the bonds to be issued, nor the projects to be constructed with the bond proceeds. Under North Carolina law, the bonds are not "tied to" specific building

projects; the Board of Education is at liberty to construct any lawful projects it may now decide upon and for which the County Commissioners will approve the issuance of bonds. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971); Sykes v. Belk, 278 N.C. 106, 179 S.E.2d 439 (1971); Atkins v. McAdden, 229 N.C. 752, 51 S.E.2d 484 (1949); Westbrook v. Town of Southern Pines, 215 N.C. 20, 1 S.E.2d 95 (1939).

The questions presented in the petition are based upon issues that have not been before either the District Court or the Court of Appeals for decision, and have not been decided by either of those courts. To the extent that those questions are based on issues properly raised in this case, they are left open for further action by the District Court which can then be reviewed by the Court of Appeals. Should this Court accept certiorari it would limit its review to whether or not the Court of Appeals committed error in deciding what it did and would not go any further into the merits of the case than is necessary to decide the matter upon review. Ex parte National Enameling and Stamping Co., 201 U.S. 156, 26 S.Ct. 404, 50 L.Ed. 707 (1906); Caterpillar Tractor Company v. International

Harvester Company, 120 F.2d 82, 86 (3rd Cir. 1941); Drittel v. Friedman, 154 F.2d 653 (2d Cir. 1946); Missouri-Kansas-Texas Railroad v. Randolph, 182 F.2d 996, 999 (8th Cir. 1950); Barnwell Drilling Co. v. Sun Oil Co., 300 F.2d 298 (5th Cir. 1962); Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67 (2d Cir. 1966), cert. den. 385 U.S. 971, 87 S.Ct. 508, 17 L.Ed.2d 435 (1966); Virginia Airmotive Ltd. v. Canair Corp., 393 F.2d 126 (4th Cir. 1968).

III. Questions Raised by Petition

No effort will be made to deal with each of the questions raised in the petition since it is unnecessary to do so for the reasons previously set out.

A. The facts of the case are disputed. The petition asserts in various places that it is "admitted" or "not disputed" that various allegations of the Complaint are true. None of the defendants has made any admissions of any kind in this case. The defendants have all filed motions to dismiss and, of course, for the purpose of considering those motions, the allegations of the Complaint are taken as true. The application of this procedural rule does

not mean, however, that the facts of the Complaint are "not disputed." If the motions are denied and the defendants file answer, many of the allegations of the Complaint will be denied and will be "disputed."

B. The issues in this case are duplicative of the issues in another school desegregation case now pending before the District Court. The petitioners assert that the respondents have delayed and been uncooperative in this case. This is not true. It is true that the respondents have been forced to defend two lawsuits seeking the same end and that at the time of the filing of the present complaint in this action in January of 1970, the case of Scott v. Winston-Salem/Forsyth County Board of Education, No. C-174-WS-68, was more than a year old and had proceeded into extensive discovery. To the extent that this case raises viable issues, it duplicates the complaint in the Scott case. The Scott case raised the issue of school construction and sought to enjoin such construction that did not contribute to the desegregation of the schools. It also raised issues as to the assignment of pupils and teachers and practically all other phases of school operations. The

only claims that the petitioners in this case raise that are not a part of the Scott litigation are the contention that the City of Winston-Salem should beautify the areas surrounding certain schools and the contention that the plaintiffs are entitled to attorneys' fees. It is true that the respondent has objected to the plaintiffs' discovery efforts. It has done so because it felt that it was unfair to the taxpayers of Forsyth County to incur great expense in duplication of efforts in a case that had been mooted by other litigation. It has now been agreed by counsel for the parties that information sought in this case which is available in the file of the Scott case need not be furnished independently in this case.

C. It was not necessary for the District Court to find facts or to base its order on evidence offered by the respondent. The motion made by the respondent in the District Court was made under Rule 54 of the Federal Rules of Civil Procedure and the order of the Court was in the nature of a judgment on the pleadings as to the issue of the validity of the bonds. The respondent was entitled to an adjudication under the rule of this potential claim and the reasons for the filing of the motion by the respondent are irrelevant. The District Court simply

decided that the Complaint did not raise the issue of validity of the bonds and this decision could be made by an examination of the Complaint without reliance on any evidence outside of the record. Similarly, it was unnecessary for the District Court to find facts to support its order since this was not a judgment on the merits after trial within the meaning of Rule 41. The judgment of the District Court is founded solely on the Complaint and is unassailable on that basis.

D. The petition is not related to the issue before the Court of Appeals. The petition does not address the issue that would be reviewed should this Court grant the writ of certiorari. Instead, it contains a melange of arguments, some attacking the opinion of the Court of Appeals, others going outside of the record completely to attack the pupil assignment plan now operated by the respondent, and still others berating the Court of Appeals for not deciding issues that were not before it. This respondent would urge the Court in considering the petition to note the limited nature of the relief granted by the District Court and the Court of Appeals as set out in the appendix to the petition.

This case, for example, has nothing to do with the pupil assignment plan now operated by the respondent in the public school system of Winston-Salem/Forsyth County. That plan was approved in an entirely different case by the District Court and its effects are completely outside of the record of this case. Similarly, there has been no adjudication as to whether or not the petitioner, or the respondents would be entitled to attorneys' fees in this case and this question was not decided by the District Court or the Court of Appeals. Not being before the Court of Appeals it would not be the proper subject of review in this Court. See Ex parte National Enameling and Stamping Company, supra.

The only proper subject of review of this case by this Court on certiorari would be whether the Court of Appeals erred in affirming the judgment of the District Court that the Complaint filed in this case presents no issue as to the validity of bonds. The District Court and the Court of Appeals were entirely correct in their decision and the petition does not even attack the decision directly. There is no question of public importance in this case, no question which should invoke the supervisory function of this

Court, no question of conflict between the courts of appeals, and no question that affects the substantive rights of the petitioners.

The petitioners filed on December 27, 1971, a Supplemental Brief for the purpose of citing a 1970 decision of this Court, Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The Adickes case involved a summary judgment which decided the entire claim on the merits. As previously pointed out, the instant case has to do only with the elimination of a potential claim which not even the petitioners contend actually exists in the case. The decision was that the Complaint presented no issue as to the validity of the bonds; no evidence was required to prove what the Complaint said.

Although the petitioners' point is not entirely clear, apparently they contend that no final judgment on the merits is proper without the presentation of evidence by the moving party, but, of course, this is not the case, for if it were, there could never be a judgment on the pleadings or a judgment dismissing a complaint pursuant to a motion to dismiss. On the one hand, the

petitioners contend that the respondents had to prove the absence of the issue from the Complaint and on the other hand they impliedly admit that there was no such issue by the questions raised on pages 6-8 of the Supplemental Brief. The questions could only be relevant if it is assumed that the Complaint does not put the validity of the bonds into issue. The petitioners' position is anomalous to say the least.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-733

Harvey H. Allen and Simona A. Allen,

Petitioners

vs

State Board of Education of North Carolina et al.,

Respondents

****

SUPPLEMENTAL BRIEF OF PETITIONERS

****

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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-733

Harvey H. Allen and Simona A. Allen,

Petitioners

vs

State Board of Education of North Carolina et al.,

Respondents

****

SUPPLEMENTAL BRIEF OF PETITIONERS

****

Petitioners, Harvey H. Allen and Simona A. Allen, file this supplemental brief pursuant to Rule 24(5) of the Rules of this Court, which reads:

> "Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing."

Specifically, Petitioners seek permission to call to the Court's attention the case of Adickes v S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), in which this Court granted certiorari to review and then reversed a decision of the Court of Appeals for the Second Circuit, which affirmed a summary judgment entered by the District Court for the Southern District of New York.

Adickes has a major heading (398 U. S. at 153) entitled "B. Summary Judgment," under which this Court seems to decide at least three things regarding summary judgments:

1. One who seeks a summary judgment has "the burden of showing the absence of a genuine issue as to any material fact, and for these purposes" the evidence offered "must be viewed in the

light most favorable to the opposing party." (398 U.S. at 157)

2. The evidence offered must be sworn, and unsworn evidence "does not meet the requirements of Fed. Rule Civ. Proc. 56(e)." (398 U.S. at 158, Note 17)

3. If the "initial burden" of proof is not sustained by one who seeks a summary judgment, then the opposing party is "not required to come forward" with any contrary evidence. (398 U.S. at 160)

In this case Respondents did not offer any evidence of any kind, either sworn or unsworn, and that is why Petitioners believe that their case is stronger than Adickes on the questions of summay judgment.

EVIDENCE IS INDISPENSABLE

In the opinion of Petitioners, the effect of Adickes is that sworn evidence which establishes "the absence of a genu-

ine issue as to any material fact" is an indispensable ingredient of a summary judgment under the Federal Rules of Civil Procedure, and that without such evidence it is not possible to secure a valid summary judgment under Federal law.

DISMISSAL ON MERITS WITHOUT EVIDENCE

Without hearing any evidence and entirely "based on facts not appearing of record" (Rule 43(e) of Federal Rules of Civil Procedure), and without finding "the facts specially" (Rule 52(a) of the Federal Rules of Civil Procedure), the District Court dismissed on the merits (as "merits" are defined by Rule 41(b) of the Federal Rules of Civil Procedure), "any claim raised by the pleadings in this cause that would affect the validity of the 24.8 million dollar bond issue voted by the people of Forsyth County on

March 16, 1968" ("Exhibit C" attached to the Petition for Certiorari).

The "facts not appearing of record" were delineated in the Brief of Respondent Winston-Salem/Forsyth County Board of Education before the Court of Appeals, in statements which include the following at the pages indicated:

> "Because of these allegations in the Complaint, bond counsel has refused to issue a 'no litigation' certificate, which the County must have in order to market the bonds." (Pages 3-4)

> "A final and irrevocable determination of the validity of the bonds must be made before bond counsel can be induced to issue their certification making the bonds marketable." (Page 5)

> "Should the court below be affirmed, bond counsel has indicated that they will issue their no litigation certificate and the Board of County Commissioners will be able to issue the bonds in its discretion." (Page 6)

> "The plaintiffs have never con-

> tended that the bond election was invalid or that the bonds when issued would not be valid obligations of the County of Forsyth." (Page 4)

Bond counsel did not take the stand and no evidence of any kind was offered at the hearing of the motion for summary judgment.

Petitioners respectfully suggest that, before any part of the substitute complaint of Petitioners could be lawfully dismissed under this Court's Adickes case, supra, sworn evidence would have to be put in the record establishing the absence of any issue as to any material fact encompassed within such pertinent questions as the following concerning the facts not appearing of record in this case:

1. Was the refusal of bond counsel to issue its certificate in writing, and if so what were the written provi-

sions of such refusal and their relation to the alleged necessity of dismissing parts of the substitute complaint?

2. What proof is there that the bonds could not in fact be sold without a no-litigation certificate from bond counsel employed by Respondents?

3. What proof is there that no other bond counsel would issue such a certificate without dismissal of parts of the substitute complaint?

4. What proof is there that the bonds would not in fact be valid obligations of Forsyth County without such a certificate from bond counsel employed by Respondents?

5. The final summary judgment having dismissed "any claim raised by the pleadings" to which in effect bond counsel objected, was there included in the dismissal the claim in the substitute com-

plaint that the Court of Equity should not allow the bond issue to be issued and sold under the circumstances of this case "except pursuant to a plan approved in advance by" the Court, and what proof is there that this claim is related in any way to the alleged need for a no-litigation certificate, or that this claim should be dismissed without hearing any evidence to support it?

WHEREFORE, Petitioners pray:

1. That the Court permit to be added to the Petition for Certiorari the case of Adickes v S. H. Kress & Co., supra, and particularly the section of Adickes which bears the heading "B. Summary Judgment," 398 U.S. at 153.

2. That the Court compare the factual situation in Petitioners' case, where no evidence of any kind, sworn or

unsworn, was heard upon the motion for summary judgment, with the factual situation in Adickes, where both sworn and unsworn evidence was submitted, but still this Court granted certiorari and reversed the summary judgment.

3. That the Court, on the strength of Adickes, as well as the record and the authorities in the Petition for Certiorari, grant certiorari in this case as adequately meeting the requirements of Rule 19(1)(b) of the Rules of this Court.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-733

Harvey H. Allen and Simona A. Allen,

Petitioners

v.

State Board of Education of North Carolina; Charles F. Carroll, etc.; Winston-Salem/Forsyth County Board of Education; Board of County Commissioners of Forsyth County; and City of Winston-Salem, North Carolina,

Respondents

RESPONSE OF FORSYTH COUNTY, NORTH CAROLINA, BOARD OF COMMISSIONERS TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-733

Harvey H. Allen and Simona A. Allen,

Petitioners

v.

State Board of Education of North Carolina, et al.,

Respondents

RESPONSE OF FORSYTH COUNTY, NORTH CAROLINA, BOARD OF COMMISSIONERS TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The respondent, Board of County Commissioners of Forsyth County, North Carolina, files this Response or opposing brief pursuant to Rule 24 of the Supreme Court Rules in opposition to the Petition docketed with this Court on December 3, 1971. The plaintiffs below have

petitioned this Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the decision of said Court entitled Harvey H. Allen and Simona A. Allen v. State Board of Education of North Carolina, et al., 447 F. 2d 960 (No. 71-1563, 4th Cir. 1971). The text of that Opinion is set forth as petitioners' "Exhibit A," Appendix, pp. 1 through 3. The purpose of this Response is to disclose to the Court, pursuant to Rule 24 of the Supreme Court Rules, why the cause should not be reviewed by this Court. In pertinent part, Rule 24 provides as follows:

> "1. Counsel for the respondent shall have thirty days ... after receipt of a petition, within which to file forty printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this court. See Rule 19. ..."

QUESTION PRESENTED FOR REVIEW

The sole question presented for review by this Court is whether or not the United States Court of Appeals for the Fourth Circuit, in its Opinion referred to infra, committed error in affirming the Order for Final Judgment (Petitioners' "Exhibit B," Appendix, pp. 4 and 5) and Final Judgment (Partial) (Petitioners' "Exhibit C," Appendix, pp. 5 and 6) holding that the Complaint in this action (Petition, pp. 22 through 29) presents no claim that affects the validity of the 24.8 million dollar bond issue voted by the people of Forsyth County on March 16, 1968. Stated differently, the question posed for review is whether or not approval by the voters of a county on the question of granting authority to issue bonds for school purposes violates the Constitution of the United States, and more particularly the

due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution (Petition, pp. 11 and 12).

The petitioners have attempted to interpose other issues before this Court which realistically are not present, basically relating to the operation of the Winston-Salem/Forsyth County, North Carolina, school system, and whether or not that system is currently being operated as a unitary system in conformance with Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 39 U. S. L. W. 4437 (1971), and Davis v. Board of School Commissioners of Mobile County, 402 U. S. 33, 39 U. S. L. W. 4447 (1971). It is respectfully submitted that these issues are not before this Court, but are under the jurisdiction of the federal courts, in.

Catherine Scott, et al. v. Winston-Salem/ Forsyth County Board of Education, et al., 444 F. 2d 99 (4th Cir. 1971), Petition for Certiorari denied, ___ U. S. ___ (1971). The Scott case was originally decided as set forth in 317 F. Supp. 453 (M. D. N. C. 1970).

The purpose of this Response is to resolve the question as to whether this case should be reviewed by the Supreme Court in light of Rule 19 of the Supreme Court Rules and the considerations contained therein. Embraced in this consideration is the issue: Should the decision below that the Complaint does not affect the validity of a municipal or county school bond proposal, which only sets forth the general purposes for which school bonds may be issued without regard to construction plans, location, site, or any other aspects of the

improvements (see Respondent County's Exhibit 1, p.29), be reviewed by this Court as involving a substantial federal constitutional question?

For the reasons set forth herein below, it is respectfully submitted that this cause should not be reviewed by this Court, as there are no special and important reasons therefor in view of those considerations set forth in Rule 19, which provides as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b). Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

STATEMENT OF CASE

This action was instituted by the filing of the Complaint on March 26, 1970 (Plaintiffs' Petition, pp. 22 through 29). On March 18, 1971, the defendant, Winston-Salem/Forsyth County, North Carolina, Board of Education, filed a Motion for Final Summary Judgment (Petitioners' "Exhibit D," p. 7 of Appendix to Petition), praying that the District Court enter summary judgment that

the Complaint presents no claim that could affect the validity of the 24.8 million dollar bond issue passed by the voters of Forsyth County on March 16, 1968 (Respondent County's Exhibit 1, Appendix, p. 29). On May 6, 1971, the District Court entered Final Judgment (Partial), Petitioners' "Exhibit C," having theretofore ordered on April 20, 1971, that such Final Judgment be entered (Petitioners' "Exhibit B"). This case has not been heard on the merits, attributable to the fact that the Scott case, cited supra, preceded this case and involved substantially the same issues and had progressed to such a point that a hearing on the merits had basically been accomplished. In its per curiam Opinion in the Scott case, the Court of Appeals stated:

"... we remand to the respective district courts with instructions to receive from the respective school boards new plans which will give effect to Swann and Davis."

In October of 1971, this Court denied the School Board's Petition for Certiorari to review that decision of the Court of Appeals.

The Scott case is deemed pertinent to the matter under consideration, inasmuch as the history of that case would, in large measure, be repeated in the Allen case and involves substantially the same issues as present in the Scott case. As stated in the Court of Appeals Opinion in the Allen case (Petitioners' "Exhibit A"):

"This same school district is involved in another school desegregation case which was recently before this court. Scott v. Winston-Salem/Forsyth County Board of Education, 4 Cir., ___ F. 2d ___ (June 10, 1971). That case was remanded to the District Court for further proceedings for the final achievement of a unitary system. The Scott case

involves some of the issues remaining in this case."

(Emphasis added)

ARGUMENT

It is respectfully contended by the County that this is not an appropriate case for review by the Supreme Court, and that the Petition filed herein should be denied. Under Rule 19 of the Supreme Court Rules and those considerations referred to therein, the Court of Appeals has not rendered a decision in conflict with the decision of any other court of appeals on this same matter; the Opinion of the Court of Appeals was not decided in a way in conflict with applicable North Carolina law (in fact, the Opinion is fully in accord with the law of North Carolina, as will be shown herein below); the decision did not decide an important question of federal law, and that decision is in no manner in conflict

with applicable decisions of this Court. There was no departure from the accepted and usual course of judicial proceedings, the Court of Appeals simply having found that the Complaint in this cause presented no claim which could affect the validity of the school bond issue as authorized by the voters of Forsyth County, North Carolina (the issue submitted to the voters being attached to the Response as County Exhibit 1). As has been reiterated by the County throughout hearings of this case, the petitioners have confused the validity of the bonds themselves with the expenditure of proceeds, which may be derived from bond funds or any other source. In reality, there is no contention whatsoever as to the validity of the bond election, the procedures by which the election was held, or the legality of authorizing, by popular vote, the issuance of school bonds. The petitioners'

concern has continually been in regard to proceeds expended for school purposes, which may be derived from bond proceeds, tax funds, nontax funds, or from any other source of revenue available to government. As the validity of the bonds themselves is not in issue, this case does not present an appropriate matter for Supreme Court review.

Initially, for the benefit of the Court, the respective areas of responsibility for local school matters in North Carolina should be clarified. The case of Dilday v. Board of Education, 267 N.C. 438, 148 S. E. 2d 513, 149 S. E. 2d 345 (1966), states distinctly the relative responsibilities and duties of local county governing bodies and local boards of education:

> "Plaintiffs' second and third contentions require a consideration of the relative duties of county commissioners and county boards of education with reference to the public schools.

"The authority and duty to operate county schools is vested in the county board of education, which is required to provide adequate school buildings, suitably equipped. G. S. 115-35; G. S. 115-29. The board of education determines, in the first instance, what buildings require repairs, remodeling, or enlarging; whether new school houses are needed; and if so, where they shall be located. Such decisions are vested in the sound discretion of the board of education, and its actions with reference thereto cannot be restrained by the courts absent a manifest abuse of discretion or a disregard of law. Feezor v. Siceloff, 232 N. C. 563, 61 S. E. 2d 714; Board of Education v. Lewis, 231 N. C. 661, 58 S. E. 2d 725; Waldrop v. Hodges, 230 N. C. 370, 53 S. E. 2d 263; Atkins v. McAden, 229 N. C. 752, 51 S. E. 2d 484.

"Each year the board of education surveys the needs of its school system with reference to buildings and equipment. By resolution it presents these needs, together with their costs, to the commissioners, who are 'given a reasonable time to provide the funds which they, upon investigation, shall find to be necessary for providing their respective units with buildings suitably equipped. ...' G. S. 115-129. It is the board of commissioners, therefore, which is charged with the duty of determining what expenditures shall be made for the erection, repairs, and equipment of school buildings in the county. Johnson v. Marrow, 228 N. C. 58, 44 S. E. 2d 468. However, as

pointed out in Atkins v. McAden, supra, the commissioners' control over the expenditure of funds for the erection, repair, and equipment of school buildings does not interfere with the exclusive control of the schools which is vested in the county board of education or in the trustees of administrative units. Having determined what expenditures are necessary and possible, and having provided the funds, the jurisdiction of the commissioners ends. The authority to execute the plans is in the board of education. Parker v. Anson County, 237 N. C. 78, 74 S. E. 2d 338."

(Emphasis added)

267 N. C. 438, 448 and 449

Petitioners speak of the adoption of a plan for the expenditure of the bond proceeds, and contend that schools may be identified in the local school system by race, and that school building programs must eliminate a dual school system. These allegations evidence the confusion of the petitioners as regards a bond issue from which proceeds might be derived for school purposes and the expenditure of the proceeds themselves. This distinction has

been recognized in North Carolina continually, said distinction being not a subterfuge, but one of reality, as demonstrated by the relative responsibilities of local governing bodies and local school boards, set forth in the Dilday case, supra. See Harris v. Board of Commissioners of Washington County, 274 N. C. 343, 163 S. E. 2d 387 (1968); Atkins v. McAden, 229 N. C. 752, 51 S. E. 2d 484 (1949); Sykes v. Belk, 278 N. C. 106, 179 S. E. 2d 439 (1971); Coggins v. City of Asheville, 278 N. C. 428, 180 S. E. 2d 149 (1971); and Rider v. Lenoir County, 236 N. C. 620, 73 S. E. 2d 913 (1952). The foregoing cases clearly demonstrate the legality of funding school operations by the authorization for and issuance of bonds. Respondent's Exhibit 1, the

bond proposal voted upon by the residents of the County, on its face, clearly indicates only approval for erecting school buildings and other facilities, including remodeling and additional construction, without specifying location, situs, or any other aspects which the petitioners attempt to raise in the Petition. Clearly, the bond issue is valid on its face.

Of paramount importance in the consideration by this Court of the Petition is the fact that there is no federal question raised in regard to the validity of the bond proposal itself. The petitioners' questions relate to issues which may be raised in the future in this case in regard to the expenditure of proceeds - but proceeds may come from many varied sources, and the source of the proceeds

bears no relevance to questions which might be related to the expenditure of proceeds. This valid distinction was recognized by the Court of Appeals, wherein that Court stated in its Opinion, which is the subject of this Petition:

> "The relief sought stems entirely from an expression of concern that the proceeds of the bond issue might be spent in such a way as to encourage a segregated school system.
>
> "The District Court granted a partial summary judgment, ... in which it was held that any present or future controversy which may exist over the expenditure of the proceeds of the school bond issue does not affect their validity, ..."
>
> (Emphasis added)

Thus, the Court of Appeals recognized the valid distinction existing between the bond issue itself and proceeds or expenditures which might be derived from that bond issue. That determination did not involve a question

of federal constitutional law, much less a substantial one, but in reality only decided the issue consistent with the law of North Carolina. In the bond proposal or issue in question, as set forth in County's Exhibit 1, there is no detail concerning estimates as to particular projects or a description of the projects themselves. Under North Carolina law, this is not necessary. As stated in the Atkins case, cited supra, at page 755:

> "The detailed estimates given and the projects described in the bond order were not essential to the validity of the order, and it is so provided in the statute."

Section 77 of Chapter 153 of the North Carolina General Statutes, entitled:

> "Purposes for which bonds may be issued and taxes levied,"

provides in pertinent part:

> "The special approval of the General Assembly is hereby given to the issuance by counties of bonds and notes for the special purposes named in this section, ... :
>
> "(1) Erection and purchase of school houses, school garages, physical education and vocational education buildings, teacherages, lunchrooms, and other similar school plant facilities."

G. S. 153-77 (1927)

Section 79 of Chapter 153 of the North Carolina General Statutes (1927) provides as follows:

> "§ 153-79. Order need not specify details of purpose.— In stating the purpose of a bond issue, an order need not specify the location of any improvement or property, or the material of construction."

Petitioners, as stated hereinbefore, make no contentions or allegations in regard to the validity of the bond order as set forth as Exhibit 1 herein,

the election procedures, or the procedures by which the bonds would be issued, it being clear that their concern is in regard to the expenditure of funds rather than the validity of the bonds themselves. The law of North Carolina requires no detail of the purpose or locations of sites for school purposes; and the question before this Court, the validity of the bond order itself (as opposed to the questions raised by the petitioners relating to funds), does not involve a federal question, is a question of state law, and was properly decided by the Court of Appeals. The consideration of the question before this Court as to the validity of the bond proposal based upon the Complaint does not involve resolving a federal question. The following offers an understanding of this distinction between

the bonds and the proceeds (quoting from the Sykes case, supra):

> "Plaintiffs do not attack the election for failure to meet procedural requirements; neither do they contend that the ordinance, the notice of election, the ballot, or any formal action of the City Council invalidated the election."
>
> 179 S. E. 2d 439, 444

Of perhaps equal, if not more significance on the question of whether or not this Court should grant the Petition is the Scott case, cited supra. As stated by the Court of Appeals in its Allen Opinion, which is not disputed by the petitioners, the Scott case involves some of the issues which remain in this case. In fact, those issues which are raised by the petitioners before this Court are issues previously heard on the merits in the Scott case before the District Court (Middle District, North

Carolina). The Court of Appeals remanded to the District Court with instructions to receive new plans from the School Board to give effect to Swann and Davis. The Petition of the School Board for review by this Court was denied (____ U. S. ____, October, 1971). If this Court did not elect to review the Scott decision and the issues therein, it is difficult to conceive why this case should be accorded that privilege, especially in view of the fact that the Allen case has not been heard on the merits, and the questions presented by the Petition do not actually deal with the validity of the bonds, but deal with the operation of the local school system, matters over which the Scott case assumed

jurisdiction and which were fully litigated before the District Court and the Court of Appeals. The School Board is currently operating under a pupil assignment plan for the school year 1971-1972, approved and ordered implemented by the District Court, under mandate from the Court of Appeals to adopt a new plan in compliance with Swann and Davis.

SUMMARY

The Petition only presents the question of whether the Complaint in this action affects the validity of the bonds referred to and discussed herein. There is no federal constitutional question involved. To the extent any such question is involved, it could only relate to the expenditure of funds for school purposes, as

opposed to the means by which funds may be generated or raised. None of the bonds in question have been issued, and no revenues therefrom have been raised. Consequently, no potential funds therefrom have been encumbered or appropriated for school purposes. To say the least, the petitioners' action is premature. The only question which could be resolved by this Court if the Petition were granted would be whether or not bonds may be approved by the voters of a particular governmental unit as a means of raising revenues for local schools. Stated differently, the question would be: By authorization of and approval in a vote by the citizens of a county on the question of whether or not bonds may be issued

for school purposes, how has there been a constitutional violation? As stated by this Court in the Swann case:

> "One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation cases for purposes beyond their scope, ..."

39 U. S. L. W. 4437, 4444

In referring to the power which the petitioners herein seek to invoke through this Court, Swann states:

> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. ..."

39 U. S. L. W. 4437, 4441

The authorization for a local governing body to raise revenues for school purposes by the issuance of bonds does not involve a constitutional violation. A "right and a violation" (Swann, p. 4441) have not been shown.

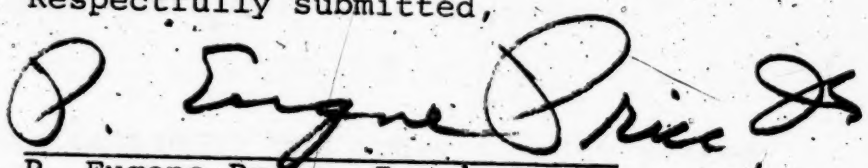
The case of Griffin v. County School Board of Prince Edward County, Virginia, 377 U. S. 281, 84 S. Ct. 1226 (1964), bears no relevance to the situation existing here. There the public schools of Prince Edward County were closed while public schools in all other counties in Virginia were being maintained. The Board of Supervisors in that county was expending funds to assist private schools which excluded Negroes from admission. Schools for whites were being operated with government funds but not for blacks, and the Court found that the law of Virginia treated the school children of that county different from the way it treated the school children of other Virginia counties. Only segregated private schools were in operation, supported by local and state funds. Clearly, the Griffin case has no application

to the case at hand or the issue of whether or not this Court should grant certiorari.

The only question presented by this Petition is the validity of the school bonds. The bonds themselves bear no relevance to questions involved in school desegregation cases, as they only represent a potential source of funds. There is no constitutional question involved or raised, much less a substantial one. For the reasons stated herein, it is respectfully requested that the Court deny the petitioners' request for a writ of certiorari to the United States

Court of Appeals for the Fourth Circuit.

Respectfully submitted,



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RESPONDENT COUNTY'S EXHIBIT 1

School Bond Proposal or Issue Approved by the Voters of Forsyth County, North Carolina, on March 16, 1968, at a Duly Held Election

(FOR) (AGAINST) the order finally passed on January 29, 1968, authorizing the County of Forsyth, North Carolina, to contract a debt, in addition to any and all other debt which said County may now or hereafter have power or authority to contract, and in evidence thereof to issue School Building Bonds in an aggregate principal amount not exceeding $24,800,000 for the purpose of providing funds, with any other available funds, for erecting additional school buildings and other school plant facilities, remodeling, enlarging and reconstructing existing school buildings and other school plant facilities, and acquiring necessary land and equipment therefor, in order to provide additional school facilities in the County of Forsyth to maintain the six-months' school term in said County as required by Section 3 of Article IX of the Constitution, and a tax therefor.

CERTIFICATE OF SERVICE

I, P. EUGENE PRICE, JR., attorney at law and counsel for the respondent, Board of County Commissioners of Forsyth County, North Carolina, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that pursuant to Rule 33 of the Supreme Court Rules, I did serve on each of the parties to this cause, through their counsel, three (3) copies of the foregoing Response of Forsyth County, North Carolina, Board of Commissioners to Petition for Writ of Certiorari to United States Court of Appeals for the Fourth Circuit, by depositing said copies in the United States mail, postage prepaid, addressed as follows:

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This the 31 day of December,
1971.

P. Eugene Price, Jr.

P. Eugene Price, Jr.

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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-733

Harvey H. Allen and Simona A. Allen,

Petitioners

vs

State Board of Education of North Carolina et al.,

Respondents

****

REPLY BRIEF OF PETITIONERS

****

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SUPREME COURT OF THE UNITED STATES

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****

REPLY BRIEF OF PETITIONERS

****

Petitioners, Harvey H. Allen and Simona A. Allen, file this Reply Brief pursuant to Rule 24(4) of the Rules of this Court, which reads:

> "Reply briefs addressed to arguments first raised in the briefs in opposition may be filed, but distribution under paragraph 3 hereof will not be delayed pending the filing of such briefs."

I
MEANING OF WORD "VALIDITY"

The Briefs in Opposition to certiorari for the first time focus upon the meaning of the word "validity", advancing the contention that, despite this Court's decision in Adickes v S.H. Kress & Co., 398 U.S. 144,153, the District Court could enter and the Court of Appeals affirm a valid summary judgment without hearing any evidence to support Respondents' "burden of showing the absence of a genuine issue as to any material fact" (398 U.S. at 157). On Page 16 of the Brief in Opposition of Respondent Winston-Salem/Forsyth County Board of Education it is said:

> "The decision was that the Complaint presented no issue as to the validity of the bonds; no evidence was required to prove what the Complaint said."

A contrary view of the meaning of the

word "validity" in the context of this case, as admitted on Page 3 of said Brief in Opposition, is that taken by Respondents' own experts, namely, bond counsel employed by Respondents, who have found in the "allegations of the complaint" sufficient question as to the "validity" of the bonds in a Court of Equity to refuse to issue bond counsel's "no litigation" certificate.

When this position of Respondents' own bond counsel experts is coupled with the relief sought by Petitioners that issuance and sale of the bonds be enjoined "except pursuant to a plan approved in advance by" the Court of Equity, it seems clear to Petitioners that the record disclosed issues as to material facts concerning "validity" of the bonds in Equity which Respondents failed to demonstrate the absence

of, as required by the Adickes case, supra.

The word "validity" is not a word of art. One meaning may attach to bonds in the hands of innocent purchasers for value. The meaning may vary in a Court of Equity before a school bond issue has been sold. In Swann v Charlotte-Mecklenburg, 28 L. Ed.2d at 566, this Court said:

> "Once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." (Emphasis is added.)

"Past wrongs" in school construction in this case are abundant. (See Pages 25-27 of Petition for Certiorari.)

II
WAS THERE SUMMARY JUDGMENT?

For the first time (Page 13), said Brief in Opposition suggests that the final judgment here involved was really not a summary judgment after all, but "was in the nature of a judgment on the pleadings."

This obvious effort to avoid this Court's Adickes decision will not wash for two simple reasons: (1) the motion for that judgment ("Exhibit D" of the Petition for Certiorari) moved "That final Summary Judgment be entered" and (2) the decision of the Court of Appeals ("Exhibit A" of the Petition for Certiorari) says, "The District Court granted a partial summary judgment."

The final judgment here involved could not be a judgment on the pleadings, because Rule 12 of the Federal Rules of Civil Procedure provides in part that a motion for judgment on the pleadings may be filed only "After the pleadings are closed."

Since the Respondents Winston-Salem/Forsyth County Board of Education and City of Winston-Salem have not even yet filed any answers, the pleadings still are not

closed in this case.

In direct answer to Adickes, it is said on Page 16 of the Board of Education's Brief in Opposition that "The Adickes case involved a summary judgment which decided the entire claim on the merits." But Adickes itself says, 398 U.S. at 148, that the summary-judgment claim "was dismissed before trial on a motion for summary judgment," which is exactly what happened in this case.

III

NO DUPLICATION OF SCOTT

Both Briefs in Opposition (Page 12 of that by Winston-Salem/Forsyth County Board of Education and City of Winston-Salem) and (Page 9 of that by the Board of County Commissioners), emphasize an alleged duplication of the so-called Scott case, No. 71-274 of the October, 1971 Term of the Supreme Court of the

United States. The only document in the Scott case which even mentions the $24.8 million bond issue here involved was a motion filed in the Scott case on January 13, 1969 by the plaintiffs in the District Court, in which motion said plaintiffs sought to add to their complaint a challenge of the $24.8 million bond issue. That motion was denied by the District Court and no question as to that decision was raised on appeal.

In connection with the Scott case, on September 9, 1971 Respondent Winston-Salem/Forsyth County Board of Education filed in that case in the District Court a motion which asked the District Court to "reconsider and vacate its Orders of June 22, 1971, and July 26, 1971, and that Winston-Salem/Forsyth County Board of Education not be required to operate its school system under the 'Revised

Pupil Assignment Plan for the 1971-72 School Year' as directed in said July 26, 1971, Order." The Orders sought to be vacated are among the Orders which the Chief Justice declined to stay in his Opinion of August 31, 1971, and which this Court later declined to grant certiorari to review.

No mention is made of the $24.8 million bond issue here involved in that motion to vacate Orders of the District Court. But said motion does rely almost entirely upon said Respondent's interpretation of the views of the Chief Justice as expressed in his Opinion of August 31, 1971, the motion saying among other things (at Page 4):

> "It appears clear from his opinion denying the application for a stay in this case that he does not believe that the Board of Education was required to achieve the results de-

creed by this Court's orders of June 22 and July 26, 1971."

The Opinion of the Chief Justice denying a stay on August 31, 1971 is pertinent to this case. (See Pages 36 and 45 of the Petition for Certiorari.)

Respectfully submitted,

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